

STATE OF NEW YORK

DIVISION OF TAX APPEALS

|  |   |                |
|--|---|----------------|
| In the Matter of the Petition                | : |                |
| of   | : |                |
| ARTHUR SCHULKIN                              | : | ORDER          |
| D/B/A SCHULKIN'S NEWSSTAND                   | : | DTA NO. 814744 |
|  | : |                |
| for Review of the Revocation of his License  | : |                |
| as a Lottery Sales Agent Under Article 34 of | : |                |
| the Tax Law for the Year 1995.               | : |                |

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Petitioner, Arthur Schulkin d/b/a Schulkin's Newsstand, 76 Broad Street, New York, New York 10004, filed a petition on February 21, 1996 protesting the revocation of his license as a state lottery sales agent by the New York State Division of the Lottery. Petitioner appeared by Goldberg, Gonciarz and Scudieri, P.C. (Edward F. Gonciarz, Esq., of counsel).

On March 13, 1996, a Notice of Intent to Dismiss Petition signed by Frank A. Landers of the Petition Intake, Review and Exception Unit was issued pursuant to the provisions of section 2006(5) of the Tax Law and section 3000.9(4) of the Tax Appeals Tribunal Rules of Practice and Procedure (20 NYCRR 3000.9[4]).

On April 4, 1996, the Division of the Lottery (appearing by William J. Murray, Esq.) filed a motion seeking permission to appear in the instant proceeding, dismissal of the Division of Taxation from this proceeding and substitution of the Division of the Lottery as the respondent party, and dismissal of the petition.

On April 11, 1996, petitioner filed an affirmation in opposition to the Notice of Intent to Dismiss and in reply to the Lottery Division's motion. In its affirmation, petitioner opposes the Notice of Intent to Dismiss and the Lottery Division's motion to dismiss but "neither consentsto nor contests the inclusion of the Lottery Division as a Respondent to this proceeding."

On April 17, 1996, by a letter dated April 3, 1996, the Division of Taxation by Steven U. Teitelbaum, Deputy Commissioner and Counsel (Carroll R. Jenkins, Esq., of counsel) indicated that it would not be filing papers opposing the Lottery Division's motion to be

substituted as a party. Accordingly, April 17, 1996 commenced the 90-day period for the issuance of this order.

Based upon the motion papers, the affidavits submitted therewith and in opposition and all pleadings and documents submitted, Andrew F. Marchese, Supervising Administrative Law Judge, renders the following order.

#### MOTION TO ADD THE DIVISION OF THE LOTTERY

#### AS RESPONDENT AND DROP THE DIVISION OF TAXATION AS RESPONDENT

Section 3000.5 of the Rules of Practice and Procedure provides that an "administrative law judge shall be guided but not bound by the CPLR in resolving motions made pursuant to this Part." CPLR 1001(a) provides in part:

"Parties who should be joined. Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants."

CPLR 1003 provides in part that "[p]arties may be added or dropped by the court, on motion of any party or on its own initiative, at any stage of the action and upon such terms as may be just."

The Department of Taxation and Finance is made up of four divisions: the Division of Taxation, the Division of the Treasury, the Division of the Lottery and the Division of Tax Appeals (Tax Law § 170[2]). The head of the Department of Taxation and Finance is the Commissioner of Taxation and Finance. He is also the head of the Division of Taxation and is generally responsible for the collection and administration of the various taxes imposed under the Tax Law (Tax Law § 170[5]; § 171). The Division of the Lottery is a separate and independent Division headed by the Director of the Lottery who is generally responsible for the operation of the State Lottery for Education including the licensing of lottery sales agents (Tax Law §§ 1603, 1604).

The Division of Taxation has no role in the operation of the State Lottery for Education and thus has no real interest in the outcome of this proceeding. Moreover, the Division of Taxation lacks any knowledge of the underlying circumstances or policy considerations which

formed the basis for the Division of the Lottery's determination to revoke petitioner's lottery sales agent license. Conversely, the Division of the Lottery has exclusive custody over the records of petitioner's conduct as a lottery sales agent and over the license revocation proceeding here at issue. Thus, the Division of the Lottery is the real party in interest in this proceeding. If petitioner were to be successful in this proceeding, it is questionable what relief could be granted to him in the absence of the Division of the Lottery as a respondent party. Accordingly, I find the Division of the Lottery to be a necessary party to this proceeding.

Section 1003 of the CPLR requires that a motion to join a party be made by a party to an action or by the court on its own motion. Since the Division of the Lottery is not yet a party to this action, it would appear that it would not be entitled to make this motion under the CPLR. However, since a judge is authorized to add a necessary party on his or her own motion and since I have found the Division of the Lottery to be a necessary party, I am nevertheless ordering the Division of the Lottery to be added as a party to this proceeding.

With the addition of the Division of the Lottery as a respondent, I find that the real party in interest is now represented in the proceeding and that there is no further need for the retention of the Division of Taxation as a respondent. Accordingly it is further ordered that the Division of Taxation is dismissed as a party to this proceeding.

NOTICE OF INTENT TO DISMISS PETITION  
AND MOTION TO DISMISS PETITION

For purposes of the issues raised in the Notice of Intent to Dismiss Petition and Motion to Dismiss Petition, the essential facts of this case are not in dispute. Petitioner was a licensed lottery sales agent. During September of 1995, the Security Director of the Division of the Lottery commenced an investigation of petitioner due to an allegation that lottery tickets for an out-of-state game known as "Powerball" were being unlawfully sold at the location where petitioner was licensed to sell New York State Lottery tickets. Based upon the Security Director's investigation, the Director of Lottery Operations temporarily suspended petitioner's Lottery Sales Agent license and commenced a license revocation proceeding on September 26,

1995.

A hearing on the proposed license revocation was held by the Division of the Lottery on November 8, 1995. The hearing was conducted by Russell V. Gladieux, Executive Deputy Director of the Division of the Lottery, as hearing officer. Petitioner Arthur Schulkin appeared at the hearing. The Hearing Officer submitted to the Director of the Lottery a hearing report dated November 10, 1995 including findings of fact, conclusions of law and a recommended decision. A copy of the hearing report was also sent to petitioner.

The hearing report found that the agent had sold illegal lottery tickets and recommended revocation of the agent's license. On or about November 18, 1995, petitioner by his attorney, Alan J. Goldberg, submitted to the Director of the Lottery an "Administrative Appeal" setting forth exceptions, objections and replies to the hearing report. Jeff Perlee, the Director of the Division of the Lottery, issued a Decision and Order dated November 29, 1995 which accepted the Hearing Officer's recommended decision and revoked petitioner's Lottery Sales Agent license as of that date.

The Notice of Intent to Dismiss issued to petitioner on March 13, 1996 notified petitioner of the intended dismissal of his petition based upon a lack of subject matter jurisdiction of the petition. In its affirmation, the Division of the Lottery argues at paragraph eleven that "[t]here is no provision in any statute, regulation, policy or procedure which permits a license revocation decision by the Director of the Lottery to be reviewed by any authority except the New York State Supreme Court in accordance with the provisions of Article 78 of the Civil Practice Law and Rules" and additionally that the Division of the Lottery "has never requested or consented to the Division of Tax Appeals conducting any proceeding relating to the revocation of a Lottery Sales Agent License. . . ."

Petitioner argues in response in paragraph 16 of its affirmation that

"The Lottery Division has alleged that the Division of Tax Appeals has no jurisdiction over this Petition. However, the Lottery Division is a division of the Department of Taxation of [sic] Finance (and not a separate agency), and the Tax Law expressly states that all appeals of decisions within the Tax Department are to be heard by the Tax Appeals Tribunal. Therefore, Petitioner has chosen the only appropriate administrative forum for reviewing the revocation of a state lottery

license" (emphasis in original).

This case is one of first impression. There is no precedent either from the Tax Appeals Tribunal or from the courts which deals with the authority of the Division of Tax Appeals to review the actions of the Division of the Lottery or of any entity other than the Division of Taxation. Thus, we must look to the statute itself to determine the boundaries of the jurisdiction of the Division of Tax Appeals.

The purpose of the Division of Tax Appeals is described by section 2000 of the Tax Law as being:

"responsible for providing the public with a just system of resolving controversies with such department of taxation and finance and to ensure that the elements of due process are present with regard to such resolution of controversies. The division shall be responsible for processing and reviewing petitions, providing hearings as prescribed pursuant to this chapter or as a matter of right where the right to a hearing is not specifically provided for, modified or denied by another provision of this chapter, rendering determinations and decisions and all other matters relating to the administration of the administrative hearing process. The administrative hearing process is the process commenced by the filing of a petition protesting a notice issued by the commissioner of taxation and finance of a determination of tax due, a tax deficiency, a denial of a refund or credit application, a cancellation, revocation or suspension of a license, permit or registration, a denial of an application for a license, permit or registration or any other notice which gives a person the right to a hearing under this chapter."

It may be inferred from this language that the drafters of this provision contemplated that the Division of Tax Appeals would hear only protests related to the various notices issued by the Commissioner of Taxation and Finance. However, it is not at all clear that this language was intended to impose jurisdictional limitations since the statute also refers to "any other notice which gives a person the right to a hearing under this chapter."

Section 18 of chapter 282 of the Laws of 1986 makes clear that at the creation of the Division of Tax Appeals all of the adjudicatory functions of the former State Tax Commission were transferred to the Division of Tax Appeals and the Tax Appeals Tribunal. I can find no instance where the former State Tax Commission exercised jurisdiction over the licensing of state lottery agents. To the contrary, it is clear that the Director of the Division of the Lottery exercised such jurisdiction (see, Neidich v. Quinn, 90 AD2d 614, 456 NYS2d 164). Nothing in section 18 or any other provision of chapter 282 indicates the intention of the Legislature to

expand the jurisdiction of the Division of Tax Appeals to include matters formerly within the jurisdiction of the Director of the Lottery. One would think that if such were the Legislature's intention, it would have stated so explicitly.

Aside from any analysis of the Legislature's intentions, it is clear that the provisions of the Tax Law preclude review of Division of the Lottery's licensing actions by the Division of Tax Appeals. The scope of the Tax Appeals Tribunal's jurisdiction is defined by section 2006(4) of the Tax Law which makes it the duty of the Tax Appeals Tribunal

[t]o provide a hearing as a matter of right, to any petitioner upon such petitioner's request, pursuant to such rules, regulations, forms and instructions as the tribunal may prescribe, unless a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter.

While this provision has not been the subject of extensive litigation defining the scope of the Tax Appeals Tribunal's jurisdiction, there is nevertheless some guidance to be found in the matter of Meyers v. Tax Appeals Tribunal (201 AD2d 185, 621 NYS2d 519, lv denied 84 NY2d 810, 621 NYS2d 519). In this matter, the Court annulled the determination of the Tax Appeals Tribunal that the taxpayer was not entitled to a prepayment hearing to protest additions to tax imposed under section 685(c) of the Tax Law. The Court found the provisions of section 2006(4) of the Tax Law to be controlling in determining that the Tribunal had jurisdiction in that case. Central to the Court's analysis was the fact that no other provision of the Tax Law provided for, modified or denied the taxpayer the right to a hearing with respect to additions to tax imposed under section 685(c) of the Tax Law.

In applying the Court's analysis to the facts of the instant matter, it is clear that there is another provision of the Tax Law which provides petitioner with the right to a hearing. Section 1607 of the Tax Law provides that the Division of the Lottery "may suspend or revoke, after notice and an opportunity for a hearing pursuant to the state administrative procedure act, any license issued pursuant to this article." In fact, petitioner has already taken advantage of his right to a hearing under section 1607 of the Tax Law. What petitioner is seeking is a second opportunity for a hearing, presumably because he is unhappy with the outcome of the first hearing. Since petitioner has already had a hearing pursuant to the provisions of section 1607 of

the Tax Law, he is not also entitled to a hearing under section 2006 of the Tax Law.

It would appear that the appropriate review of the revocation of a lottery sales agent license by the Division of the Lottery is provided under Article 78 of the CPLR (see, Barbulean v. Lynch, 203 AD2d 819, 611 NYS2d 366 and Neidich v. Quinn, *supra*).

Petitioner argues that "Section 2006(7) of the Tax Law specifically, expressly, unequivocally and unconditionally gives the Tax Appeals Tribunal the power to review any determination of an administrative law judge, and shall have the power to review a decision, either affirming, reversing or modifying any such determination" (emphasis in original).

While it is true that the Tax Appeals Tribunal has the authority under section 2006(7) to review the determinations of administrative law judges, I believe that it is clear that the administrative law judges whose determinations are subject to review by the Tax Appeals Tribunal are those referred to in section 2010 of the Tax Law and only those referred to in section 2010 of the Tax Law. It is equally clear that Mr. Gladieux, the Executive Deputy Director of the Division of the Lottery, and Mr. Perlee, the Director of the Division of the Lottery, have never been appointed as administrative law judges under section 2010 of the Tax Law and are not administrative law judges within the meaning of section 2006(7) of the Tax Law.

Accordingly, I must conclude that section 2006(7) of the Tax Law does not bestow upon the Division of Tax Appeals jurisdiction over a matter which is not otherwise subject to the Division's jurisdiction.

It is, therefore, ordered that the Division of the Lottery is added as a respondent to this proceeding and the Division of Taxation is dismissed as a respondent to this proceeding and it is further ordered that the petition of Arthur Schulkin d/b/a Schulkin's Newsstand is dismissed for lack of subject matter jurisdiction.

DATED: Troy, New York

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CHIEF ADMINISTRATIVE LAW JUDGE